(3)

No. 91-1367

FILED
JUN 2 1992
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID A. STURMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY TO BRIEF IN OPPOSITION

The Brief in Opposition purports to respond to three petitions and seven questions. But nearly all of it (pp. 5-8, 11-23) is a response to one petition, No. 91-1367, and one issue: the obtaining by court order, and use as evidence at trial, of statements dictated by a concededly biased Swiss prosecutor and later edited by the witnesses.

1. This Decision Will Be a License To Ignore Rule 15.

Nowhere in its lengthy brief does the government deny the importance of the question presented. And the government points to no case that ever allowed what happened here. The Circuits applying Rule 15 up to now, for example, all have required at least a verbatim transcript, so that a district court could review the actual testimony and any rulings abroad, and so that the jury could at least know the words that were actually said. All those Circuits except one have required that defense counsel be permitted to question witnesses directly.

The only significant departure, which did not go so far as the Sixth Circuit here, was *United States* v. *Salim*, 855 F.2d 944 (2d Cir. 1988), a case that never was brought to this Court for review. Casting aside the careful requirements and limitations written into Rule 15, *Salim* announced that testimony under Rule 15 could be taken in virtually any fashion, unless "so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable." 855 F.2d at 953.

That extraordinary dictum of *Salim*—issued as if the detailed requirements of Rule 15 did not exist—was immediately seized upon, and widely cited, by the government as a license to ignore the Rule. Now here the *Salim* dictum has been turned into holding, and has even been extended—for even *Salim* relied heavily on the existence of a verbatim transcript, and even *Salim* said it would reject testimony "prone to inaccuracy or bias." Those reservations now are abandoned by the Sixth Circuit's holding that criminal trial evidence may consist of a summary, prepared by a person who has spent much of his

recent professional career seeking to convict these defendants. This decision now is the leading authority:

1. That bias of the foreign official does not matter.
2. That evidentiary rulings in testimony for a U.S. criminal trial can be made—unreviewed and unreviewable—by a foreign official.
3. That the right to cross-examine is reduced to the right to request a foreign prosecutor to ask questions, along with his own, rephrased and followed up or not as he sees fit.
4. That witnesses giving testimony for a U.S. criminal trial may be coached by counsel as they do so.
5. That no verbatim transcript need be taken.
6. That incomplete summaries—altered afterwards by the witnesses, without any indication of what was added or taken out—may be read to a jury in a U.S. criminal trial as substantive evidence.

In the past, the government has argued that the procedures petitioner was denied here were very important—when other Circuits provided them.[1] All the prior Rule 15 decisions (except *Salim*) emphasized that taking of

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[1] See, *e.g.*, Brief for the United States in Opposition, *Gifford* v. *United States*, Nos. 89-7100 and 89-7294, OT 1989, at 16: "the deponents in this case had to withstand full cross-examination by petitioners' own counsel and the videotape enabled the jury both to hear the deponents and examine their demeanor."

See, *e.g.*, Brief for the United States in Opposition, *King* v. *United States*, No. 76-971, OT 1976, at 7, 8: "The hearing officer imposed no limitations on the number or type of questions defense counsel could ask. . . . [T]he district court later ruled on the objections, sustaining some and overruling others. . . . [V]ideotapes in this case enabled the jury not only to hear the witness' testimony but also to observe their demeanor . . . ."

See, *e.g.*, Brief for the United States of America, *United States* v. *Badalamenti*, Nos. 87-1294 etc., 2d Cir., 1988, at 343, 348: "[A] verbatim transcript was prepared by a certified Southern District court reporter. . . . Special Master [U.S. District Judge] Palmieri directed defense counsel to proceed with cross-examination. . . . Counsel questioned the witnesses directly without the intervention of the Swiss Magistrate. . . . [T]here was extended and vigorous cross-examination."

testimony abroad was acceptable *if* it allowed, at a minimum, the right to cross-examine directly; a verbatim transcript; and rulings by an American judge. See cases at Pet. Cert. 23. Indeed, even in *Salim*, the Second Circuit relied heavily on there being a verbatim transcript for review. See p. 10, *infra*.[2]

2. The Decision Discourages Cooperation of Other Countries.

The government stresses, Br. Opp. 13, the Court of Appeals' *apologia* that "Depositions taken in foreign countries cannot at all times emulate the United States' method of obtaining testimony." Pet. Cert. 22a. But, and particularly in Switzerland, they can (and up to now *have*) come vastly closer than here. Notably, the government does not cite a single instance in which it has been unable to persuade foreign governments all over the world to provide all or nearly all the simple protections (direct cross-examination, an impartial presiding official, a verbatim record) that were denied petitioner here. See cases cited at Pet. Cert. 17 nn.11, 12.

What happened here was not necessary. The Brief in Opposition nowhere denies that these basic procedures could have been provided. The government cannot deny it, because the District Court was specifically told by Herr Holdener's superior in the Swiss Justice Department that the Swiss procedure was *not* inflexible, and that if the United States insisted, for example, on a verbatim tran-

[2] The government asserts that petitioner's "own Swiss Attorneys . . . objected to the government's suggestion that videotape be used and an American court reporter be present." Br. Opp. 21 & n.10. That is not so. The government quotes a brief filed a year earlier in Swiss collateral litigation, in which they had objected *to holding any proceeding at all*, and in so doing had simply noted that domestic Swiss law did not provide for the videotape and transcript that the U.S. prosecutors had promised to the District Court. When the Rule 15 proceeding nevertheless was held, the very first defense objection (as summarized by Herr Holdener) was as follows:

> "*Objections*: Attorney Paul Cambria raises, in the name of all defenders, the objection that he misses the drawing up of a verbatim protocol, but that only a protocol pursuant to Zurich Code of Criminal Procedure, is being prepared . . . ." (Court's Ex. A, June 5, 1989, at 5.)

script, "we will do that." P. 2a, *infra*. Switzerland in another recent case agreed to a Rule 15 proceeding that included: (1) a verbatim transcript; (2) direct questioning by counsel; (3) rulings made by a U.S. District Judge, not a Swiss prosecutor. *United States* v. *Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); see Pet. Cert. 23 & n.18. The Petition cites that case six times. Pet. Cert. 15, 17, 20, 23, 24, 29. The Brief in Opposition never mentions it.[3] Under the Sixth Circuit's decision, there now is no longer any reason for U.S. prosecutors to seek the procedural accommodations that Switzerland and other foreign governments have consistently given.

3. This Was Trial by Affidavit.

As the government benignly describes it, the witnesses later read Herr Holdener's summaries and were "permitted to correct any inaccuracies." Br. Opp. 6. They did far more than that. They were editors, not proofreaders. They were allowed *ex parte* to change their answers. They deleted things they had said, including names. They added things they had not said, sometimes entire sentences. Sometimes they contradicted prior statements. See Pet. Cert. 13. All of these changes later were read to the U.S. jury without any indication whatsoever of what had been added or changed.

What really occurred was that affidavits were made: The witnesses were interviewed by Herr Holdener. He argued with them about answers he did not like, and then he dictated the parts of their answers that he wanted. See p. 9a, *infra*. The witnesses then read and frequently altered what he had dictated. Then they signed the statements. That is not "a deposition . . . in the manner provided in civil actions." Fed. R. Crim. P. 15(d). That is not "the scope and manner of examination and cross-examination . . . such as would be allowed in the trial itself." Fed. R. Crim. P. 15(d). That is not a document

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[3] See also *United States* v. *Johnpoll*, 739 F.2d 702, 708 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984) (Switzerland "finally agreed to allow full cross-examination").

"otherwise admissible under the rules of evidence." Fed. R. Crim. P. 15(e). On the contrary, that is exactly how affidavits are prepared.[4]

These edited signed statements then were read, as if they had been testimony, and without any indication of the changes, as substantive evidence to the jury. That is trial by affidavit. Trial by affidavit violates the Fifth and Sixth Amendments. *White* v. *Illinois*, 112 S. Ct. 736, 740 (1992); *id.* at 747 (Thomas, J., concurring); *Pointer* v. *Texas*, 380 U.S. 400 (1965).

4. The Government Does Not Deny That the Presiding Official Was Biased.

Like the Court of Appeals, see Pet. Cert. 23a, the government does not try to dispute that District Attorney Holdener was a biased presiding officer. The otherwise lengthy Brief in Opposition seeks to brush past this gross due-process violation in a single, tortured paragraph. Br. Opp. 18-19.

First, it pretends that the only problem was his "role as both prosecutor and magistrate [*sic*]."[5] Br. Opp. 18. That would be unconstitutional enough, *In re Murchison*, 349 U.S. 133 (1955), but it hardly begins to describe what happened. Herr Holdener was chief Swiss prosecutor *in this very case*. For five years he had been the point-man designated to assist the United States government in obtaining evidence against these very defendants for this very prosecution. On one occasion he had even issued an arrest warrant for petitioner's father; had had him seized by police and taken into custody; and

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[4] The government compares the Holdener documents to "depositions upon written questions" pursuant to Fed. R. Civ. P. 31. Br. Opp. 13. But even in Civil Rule 31 depositions, the questions are posed in the words submitted by the lawyers, not altered by the person asking them; and Rule 31 does not permit written, edited answers. Like Rule 30, it requires a witness to appear and give oral answers, which are recorded in a verbatim transcript.

[5] The government refers to the Swiss District Attorney throughout as a "magistrate," although that was neither his title nor his function, nor what he was called in the official English translation of the Swiss documents.

then had personally conducted a Swiss-style custodial interrogation. Prior to the proceeding, he had also summoned and interrogated *in camera*, on the same subjects, at least one of the Swiss witnesses. T. 4467. The government itself describes Herr Holdener's "role" as "no different for Article III purposes than a police officer's." Br. Opp. 18. That says it.[6]

The government then complacently observes that petitioner cannot prove that Herr Holdener made any prejudicial rulings. Br. Opp. 18. To do so would indeed be quite a feat, given that one of Herr Holdener's very first rulings was that anyone who dared to make a verbatim transcript of what he or the witnesses said and did would go to jail. T. 4212, 4269-70. This Court long ago recognized that review is "illusory if no transcript is available." *Hardy* v. *United States*, 375 U.S. 277, 280 (1964). What the government is arguing is, "no record, no foul."

Finally, the government tries to shrug off the Sixth Circuit's far-reaching and broadly worded decision here as "factbound." Br. Opp. 18. It is just the opposite: it is sweeping. It is a holding that in spite of the Fifth and Sixth Amendments and the specific language of Rule 15, virtually any procedure is satisfactory.

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[6] It borders on the absurd for the government to assert that the District Judge "presided at every stage," and that "Judge White delegated none of his judicial power to Swiss Magistrate [*sic*] Holdener." Br. Opp. 17, 18. In contrast to the close *de novo* scrutiny of rulings that this Court considered essential in *United States* v. *Raddatz*, 447 U.S. 667 (1980), the District Court could not even determine what most of Herr Holdener's rulings had been. See pp. 7a, 10a, *infra*. Judge White himself acknowledged:

> "Mr. Holdener . . . was the person who had control over the conduct of this hearing." T. 4416.
>
> "[H]e acted just like I would act . . . ." T. 4422-23.
>
> "In hearing testimony, yes, he made rulings." T. 4425-26.

When attorneys described an improper witness identification Herr Holdener had allowed, the District Court permitted it nevertheless to be read to the jury "although the Court would not allow that in its courtroom." Tr. 4298.

5. The Specific Requirements of Rule 15 Were Violated.

The government pretends this is a simple matter of "former testimony" under the rules of evidence. But the Holdener documents were not "former testimony." They were his summaries, as amended, and neither he nor any other witness took the stand to be examined as to their accuracy.[7] Moreover, this was in no way "former": it was "testimony" created in and for this case, pursuant to a court order which suspended the trial until it had been obtained, authorized only if there were "exceptional circumstances" under Rule 15, and legitimate only if taken and used as specified in Rule 15.

A Criminal Rule is to be applied according to "the plain meaning of the Rule's language." *United States* v. *John Doe, Inc. I*, 481 U.S. 102, 108 (1987); *United States* v. *Robinson*, 361 U.S. 220 (1960). Rule 15(e) requires more than just meeting the "former testimony" exception of Fed. R. Evid. 804(b)(1). Admissibility at trial depends, first, on prior compliance with Criminal Rule 15(d), which requires that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself." The government says it is enough that Herr Holdener asked the questions requested. What he actually did was include some version of them, phrased by him, in his own interrogation. See pp. 8a-9a, *infra*. That is not what "would be allowed in the trial itself." See *Perry* v. *Leeke*, 488 U.S. 272, 282 (1989).[8]

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[7] It is puzzling that the government stresses that "evidence admitted under the former testimony exception traditionally was introduced by a witness recounting the substance . . . [when] a stenographic transcript was unavailable." Br. Opp. 21. There was no such witness to cross-examine here—unlike even *Salim*, where the court reporter who made a verbatim transcript "testif[ied] [at trial] both as to the procedures used and as to Rouhani's distraught demeanor." 855 F.2d at 948. Petitioner would have welcomed the opportunity at trial to have cross-examined Herr Holdener.

[8] The government reasons that because non-verbatim depositions abroad "pursuant to a letter rogatory" may be admissible in a *civil* proceeding under Rule 28(b), Fed. R. Civ. P., therefore Herr

The government says that the Sixth Amendment was satisfied because petitioner was "allowed to be present," to have a "face-to-face encounter" (*i.e.*, to see the witnesses), and to submit questions (for approval, modification, or elaboration) "through Magistrate [*sic*] Holdener." Br. Opp. 20. He "thus," says the government, "had the opportunity to cross-examine." *Id.* at 21. If that is now all that the Sixth Amendment requires, it is a vast departure from a century of this Court's decisions as early as 1895 [9] and as recent as last January.[10] And the drafters of the revised Rule 15—as well as its many opponents, who in 1975 doubted the advisability and constitutionality of granting the government this new power, see Pet. Cert. 16 n.9—surely would be surprised to learn that their carefully limited Rule is now being held to permit as evidence the conclusions of a proceeding the government likens to a police investigation. Br. Opp. 18.

6. This Was "Critical" Testimony.

To satisfy the District Court that there were "exceptional circumstances" requiring foreign depositions "in

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Holdener's product ought to be admissible in a *criminal* proceeding. Br. Opp. 13. That reasoning fails for at least three reasons:

1. Criminal Rule 15(d)'s reference to the civil rules is limited by the "except" that the "scope *and manner*" of the examination "shall be such as would be allowed in the [criminal] trial itself." (Emphasis supplied.) The government, citing only *Salim*, urges a new interpretation that would effectively read the words "and manner" out of this Rule. Br. Opp. 14-15.

2. Although Criminal Rule 15(d)—dealing with the *taking* of "depositions"—says they shall be "taken and filed in the manner provided in civil actions," *admissibility* is governed by Rule 15(e), which requires that they be "otherwise admissible under the rules of evidence." "F.R.Crim.P. 15(e) accords no presumption of admissibility simply because the deposition was taken." *United States* v. *Mann*, 590 F.2d 361, 366 (1st Cir. 1978).

3. As the government concedes, "a letter rogatory was not issued in this case." Br. Opp. 13 n.15. The only civil rules conceivably incorporated therefore would be Civil Rules 30(c) and 31(b), both of which require stenographic or electronic transcription.

[9] *Mattox* v. *United States*, 156 U.S. 237 (1895).

[10] *White* v. *Illinois*, 112 S.Ct. 736 (1992).

the interest of justice"—the standard of Rule 15—the government repeatedly told the District Court that "it is critical that we go to Switzerland to obtain that evidence." The trial was delayed for four years so that the government could get this "critical information," "very important testimony," without which it would be "put[] at a substantial disadvantage." Not to order it, the government warned, would be "like saying, can you play the game with one arm and one leg?" See Pet. Cert. 4, 7, 8.

Now, after it got everything it wanted from the District Court, the government announces to this Court that the foreign "depositions"—to await which it repeatedly obtained continuances of a criminal trial *for four years*—really didn't matter. Its former unequivocal representations to trigger Rule 15 were merely "predictive statements." Br. Opp. 23. There is a word for that style of argument. See. A. DERSHOWITZ, CHUTZPAH (1991).

Moreover, the testimony was far from harmless. It was particularly devastating to petitioner, who was charged in a single count as a tag-along defendant in the government's tax prosecution of his father, based entirely on allegations he had conspired from the age of sixteen by actions in Switzerland to help conceal his father's tax liability.[11] Moreover, "[n]o matter what the evidence was against him, he had the right to have an impartial judge." *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927).

7. The Brief in Opposition Misstates the Record.

The Brief in Opposition asserts that "[n]owhere . . . did any petitioner claim an Article III violation," that

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[11] For example, in one of the Holdener summaries, a Swiss banker "testified" that petitioner had come to him personally to open an account called "Societe." T. 4449-54. In closing argument, the government told the jury, "Now, of particular importance was [petitioner's] signature authority on the Societe account." T. 5233. In rebuttal, the government stressed it again. T. 5384. It even does so again in the Brief in Opposition, at 4. The Holdener summaries also were used to admit into evidence many banking documents which the witnesses identified. T. 4227.

"no party raised that claim either in the district court or on appeal," and that petitioner raises it "for the first time in this Court." Br. Opp. 16, 17. That is simply untrue. Petitioner and other defendants plainly argued that "defendant is constitutionally entitled to have a judge of an Article III court preside over his criminal proceedings." See pp. 3a-5a, *infra*.

That mistake may be human error, but other statements in the government's brief can be viewed only as unconscionably misleading. Its recital of the facts tells this Court that "Although an American court reporter was present, Holdener contemporaneously dictated . . . ." Br. Opp. 6. The American court reporter was "present" as a spectator, having been warned by Herr Holderner that she would be put in a Swiss prison if she even attempted to make a transcript of what occurred. T. 4212, 4269-70.

The government states as a fact that "Holdener . . . dictated the official, *substantially verbatim* summary version of the testimony." Br. Opp. 6 (emphasis supplied). That is no fact; that is fancy. A verbatim transcript produces 40 double-spaced pages *per hour*. His, after four long days, totalled 78. See Pet. Cert. 25 n.20.

Finally, the government tells this Court that in *Salim*, *supra*, there were "partial summaries by the magistrate rather than a complete verbatim transcription." Br. Opp. 15. That verges on misrepresentation. Every bit of the testimony in *Salim* was taken down verbatim by an American certified court reporter (as a U.S.-requested exception to ordinary French procedure). The Second Circuit—stressing this very point—explained:

> "All statements that were made in or translated into English are reflected in the *transcript*, which, except for the absence of conversations between Rouhani and her lawyer, *appears to constitute a complete record of the proceedings*." 855 F.2d at 948 (emphasis supplied).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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June 2, 1992

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR85-133

UNITED STATES OF AMERICA,
Plaintiff,
v.
REUBEN STURMAN, *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS OF TELEPHONE CONFERENCE BETWEEN HONORABLE GEORGE W. WHITE AND DR. LIONEL FREI, CHIEF INTERNATIONAL LEGAL ASSISTANT [*sic*] SECTION, FEDERAL OFFICE FOR POLICE MATTER [*sic*] OF THE SWISS CONFEDERATION, TAKEN IN JUDGE WHITE'S CHAMBERS, UNITED STATES DISTRICT COURT HOUSE, CLEVELAND, OHIO, ON MONDAY, DECEMBER 19, 1988, AT 9:30 O'CLOCK A.M.

PROCEEDINGS

* * * *

[3] THE COURT: You may place the call whenever [4] you are ready.

(Mr. Gaudin placed a call to Dr. Lionel Frei, and after exchanging amenities, the following discussion took place.)

MR. GAUDIN: He will talk to you personally and directly with no one else present, and if I may excuse myself, I will leave the room.

DR. FREI: All right.

MR. GAUDIN: Okay.

DR. FREI: Good-bye.

MR. GAUDIN: Good-bye, Dr. Frei, and here is Judge White.

JUDGE WHITE: Good morning, Dr. Frei.

DR. FREI: Good morning.

THE COURT: How are you this morning?

DR. FREI: Can't complain. How are you?

THE COURT: Fine. Thank you. I asked that this call be placed because I had this matter involving—criminal matter involving Reuben Sturman set for trial February 20th.

DR. FREI: Yes.

* * * *

[11] THE COURT: All right. When these depositions and if these depositions are ever taken, I understood there would be no problem of a representative of mine attending; is that correct?

DR. FREI: Yes.

THE COURT: I understood also that there might be a problem with our court reporter attending?

DR. FREI: Well, yes. That's a problem, of course, with a transcript because we have to usually—usually here for transcript we do not take verbatim transcripts but we make a summary. The Office of International Affairs [of the U.S. Justice Department], if they ask to establish a verbatim transcript, we will do that, but it will have to be in German because English is not an official language.

* * * *

[13] THE COURT: I just finished talking to Dr. Frei. What is his title?

MR. GAUDIN: Chief of International Legal Assistance Section, Federal Office for Police Matter of the Swiss Confederation in Berne, Switzerland.

* * * *

APPENDIX B

[Filed Feb. 1, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR85-133

JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff

-vs-

REUBEN STURMAN, *et al.*,
Defendants

DEFENDANT REUBEN STURMAN'S OBJECTIONS TO THE GOVERNMENT'S PROPOSED SUBMISSION TO THE SWISS CENTRAL AUTHORITY CONCERNING DEPOSITIONS

* * * *

The government makes this request for an unorthodox procedure by which to conduct the depositions, despite the fact that it has made absolutely no showing that the Swiss will refuse to accommodate a reasonable request to confer the full panoply of protections otherwise accorded a criminal defendant in the courts of the United States.

* * * *

3. Defendant further requests that the submission request that Judge White preside over the depositions. Although the Swiss may wish to have a cantonal magistrate present to represent their interests during the course of

the depositions, defendant is constitutionally entitled to have a judge of an Article III court preside over his criminal proceedings. *See Wingo v. Wedding*, 418 U.S. 461, 94 S. Ct. 2842 (1974); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858 (1982). The present request, which vests authority in a foreign magistrate to preside over the taking of testimony in these criminal proceedings, violates this important guarantee. In conjunction with this aspect of the request, the submission made to the Swiss should further request that defendants be availed the opportunity to make objections on the record during the depositions and obtain rulings from Judge White in the same manner counsel would be entitled if the depositions were being conducted in the United States.

* * * *

The above requests are neither onerous nor excessive, but are necessary to secure to the defendant his Fifth and Sixth Amendment rights to due process, effective assistance of counsel, confrontation of the witnesses against him and a fair trial presided over by a judge of an Article III court.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. CR 85-133
JUDGE GEORGE W. WHITE

UN.TED STATES OF AMERICA,
Plaintiff,
vs.
REUBEN STURMAN, *et al.*,
Defendants.

NOTICE OF DAVID STURMAN'S ADOPTION OF DEFENDANT REUBEN STURMAN'S OBJECTIONS TO THE GOVERNMENT'S PROPOSED SUBMISSION TO THE SWISS CENTRAL AUTHORITY CONCERNING DEPOSITIONS

Defendant David Sturman hereby adopts defendant Reuben Sturman's objections to the government's proposed submission to the Swiss Central Authority concerning depositions.

Respectfully submitted,

/s/ Arthur Wells, Jr.
ARTHUR WELLS, JR.

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Attorney for defendant
David Sturman

[February 29, 1988]

APPENDIX D

[4145]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal Action No. CR85-133

Judge George W. White
Cleveland, Ohio

UNITED STATES OF AMERICA,
Plaintiff,

vs.

REUBEN STURMAN, DAVID A. STURMAN
and RALPH L. LEVINE, *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE GEORGE W. WHITE,
JUDGE OF SAID COURT, AND A JURY,

* * * *

[4146] MONDAY, OCTOBER 23, 1989, 9:30 A.M.

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[4213] [Jury excused.]

[Mr. Murray:] . . . And the first thing that happened was the proceedings opened and it became apparent immediately that Magistrate Holdener had no intention of and was not capable of, because of the technology that they were employing, to make a verbatim record of what was going to and did transpire at the proceeding.

There began a rather lengthy interchange between the magistrate, the government and the defense which was not recorded on any record whatsoever because of the fact that they didn't have a court reporter there.

What they ended up having was a gentleman who sat in the room behind a typewriter, as best as I can describe it, and whenever the magistrate in his sole discretion decided that something ought to be put down in a formal way, he would go over to this individual seated behind the typewriter and stand behind him and dictate in German something that this individual would type out not in shorthand, not the way our court reporters do it, but as if he was sitting in front of a typewriter and actually typing and pecking away.

[4214] And this was a lengthy process, and at the outset, however, we interposed a number of objections which were not recorded on the record. Now, the procedure also, your Honor, just so that you have a clearer picture of what was happening, is all of the proceedings were conducted in German in the following method:

If it were Magistrate Holdener, for example, who opened the session and began the proceeding, he would speak in German. Then there would be an interpreter that was employed by Magistrate Holdener's office who would then attempt to translate what Magistrate Holdener had said into English for the benefit of those who didn't speak German, including myself.

However, one of the things that emerged was that she wouldn't translate everything that Magistrate Holdener said. There would be long periods in which he would speak in German, and then she would translate it in a way that it was quite clear that she had not translated everything that had been spoken. So we were at a disadvantage immediately in that there was some selectivity as to what the interpreter would in fact translate into English. And

the translation was in many instances far, far shorter than what had been stated in German.

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[4218] We then proceeded to attempt to make a series of additional objections, and we were met after the various translations with the statement at one point by Mr. Holdener that we could only make objections at that point if we could figure out a way to make objections that would [4219] only consume ten typewritten lines that were being created by this gentleman who was seated at this typewriter.

And he said that if you can't, then any other objections you will have to make later on in writing, which we ultimately did.

We made some objections and there came a point when Magistrate Holdener said we can't spend the whole day making objections. Get on with the depositions and proceed from there. There were many instances where we did not fully realize what was going on because of the language problem, and more importantly because not everything would be translated. Certainly not everything would be translated simultaneously with the words being spoken.

There would be long paragraphs in German and then finally we would get some inkling of what was being said, but it would be incomplete. And this seemed to pervade the entire proceedings. It was a problem that did not go away.

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[4221] What would happen is the government as it began had a typewritten list of areas that it wanted to be covered by this deposition, and the magistrate went to that area and then apparently he would summarize some form of a question, give it to the witness in German, who by the way the witness had a lawyer there and there were several times when there would be an argument between

the lawyer, the witness and the Magistrate Holdener as to what was happening, none of which would be translated.

Ultimately we just got a translation of the ultimate outcome of their argument and discussion, but no opportunity to participate during or even to hear during this interchange what was happening because it was all in German and it would not be translated.

But Magistrate Holdener would take it upon himself to decide how to frame the question in German. Then he would have a discussion with the witness and the witness's lawyer, and you would hear some German words from the witness's mouth, occasionally you would hear the witness's lawyer giving part of the answer. And then you would hear [4222] Magistrate Holdener asking some questions, all in German.

And then this exchange would go on, and at the end of it then Magistrate Holdener, apparently in an effort to summarize, would summarize what he perceived to be the outcome of his discussion. That then would be translated into English, and then he would walk over to the typewriter where the gentleman was seated, and Magistrate Holdener would dictate into the record his version of what had occurred.

He would then dictate the question and he would then dictate what he summarized or believed the witness's answer to be. There were times when that summary was more direct than others, but for the most part it was entirely up to Magistrate Holdener to decide how to put into what they call the protocol what had been stated.

And so he summarized rather than provided even the verbatim question and answer, so what we have is the summary by Magistrate Holdener, who we say was prejudiced and biased at the outset, as to what occurred.

He didn't put into the record all the questions and answers that were given in the exchange between him

and the witness, and as a matter of fact there were several times that it was obvious, even though we couldn't understand the German that they were arguing, that Magistrate Holdener was [4223] arguing with the witness and the witness's lawyer as to what in fact they were trying to say.

And then at the culmination of whatever argument they were having, Magistrate Holdener would summarize what in fact he perceived the statement to be, but the record wouldn't include a description of what the argument was that they were having over the question and answer.

He did admit, and it's even in the protocol, that he indicated that there were numerous occasions when he would follow up with additional questions in German; he wouldn't just ask them one question. He would basically have a conversation with them and keep following it up until he apparently believed that he had the answer that he wanted to have to place in the protocol.

He was the one who would rule, by the way, on the admissibility of the testimony and the evidence, even though he had no way of knowing what the parameters were of the proceeding in the United States other than a general reference to tax offenses.

Nonetheless, he took it upon himself to be the one who would determine relevance. He would not permit the witnesses to be cross-examined directly. Again it was a process where you had to ask the question, the question would be translated for Magistrate Holdener in German, and then Magistrate Holdener would pose the question in German [4224] to the witness.

We objected to that as being a denial of confrontation rights under the Sixth Amendment.

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